1986

The Law of Confessions: Part II

Paul C. Giannelli
Case Western University School of Law, paul.giannelli@case.edu

PUBLIC DEFENDER REPORTER

Vol. 9, No. 2 March-April 1986

THE LAW OF CONFESSIONS — PART II

Paul C. Giannelli
Professor of Law
Case Western Reserve University

This is the second of a two-part article on the law of confessions. The first part discussed evidentiary issues, the due process voluntariness test, and several *Miranda* issues. This article completes the discussion of *Miranda,* commencing with the issue of waiver. It also examines the Sixth Amendment right to counsel and the derivative evidence rule.

Waiver

Like most constitutional rights, the Fifth Amendment can be waived. In *Miranda* the Court wrote: "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." 384 U.S. at 470. The Court went on to state: "But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.* at 475.

The Court provided further guidance on the waiver issue in North Carolina v. Butler, 441 U.S. 369 (1979). Butler was arrested by the FBI in New York for crimes committed in North Carolina. After being read his *Miranda* rights by the arresting agent, Butler refused to sign a waiver form but nonetheless made an incriminating statement. The Court found a valid waiver, noting that the defendant had stated: "I will talk to you but I am not signing any form." Although it upheld the conviction, the Court again emphasized the heavy burden the prosecution must bear in establishing a valid waiver:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but it is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda,* mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated. *Id.* at 373.

The Court also considered a waiver issue in Tague v. Louisiana, 444 U.S. 469 (1980) (per curiam). In that case the officer who obtained the confession testified that he read the *Miranda* rights from a card but could not remember what those rights were or whether he had asked the defendant if he understood the rights as read. The Court reversed: "In this case no evidence at all was introduced to prove that petitioner knowingly and intelligently waived his rights before making the inculpatory statement. The statement was therefore inadmissible." *Id.* at 471.

Multiple Interrogations

One type of waiver issue has produced much litigation. The issue is: Under what circumstances may a suspect who has previously invoked his *Miranda* rights waive those rights in a susbsequent interrogation? The Court's cases on this issue indicate that the answer to this question depends on whether the defendant claims only the right to remain silent or also claims the right to an attorney.

Right to Silence

The first case decided by the Court on this issue was Michigan v. Mosley, 423 U.S. 96 (1975). Mosley was read his *Miranda* rights after being arrested for robbery. At that time he indicated that he did not want to answer questions and the interrogation ceased. Subsequently, a second police officer questioned him about a homicide. Again *Miranda* warnings were read. According to the Court, *Miranda* requires the police to "scrupulously honor" a defendant's decision to remain silent. In the Court's view, the conduct of the police in *Mosley* satisfied that standard:

> This is not a case. . .where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant

Public Defender Hyman Friedman
Cuyahoga County Public Defender Office, 1200 Ontario Street, Cleveland, Ohio 44113
Editor Paul C. Giannelli
Telephone (216) 443-7223

period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation. *Id.* at 105-06.

One difficulty with *Mosley* concerns its applicability under somewhat different circumstances. The Court emphasized several factors: the second interrogation involved a different crime, was conducted by a different officer, and occurred after a lapse of time (2 hours). It is unclear how the Court would have decided the issue had one of these factors differed.

Right to Counsel

Edwards v. Arizona, 451 U.S. 477 (1981), presented the Court with the right to counsel issue absent in *Mosley.* Mosely asserted only the right to remain silent. At some point in the initial interrogation, Edwards asserted the right to counsel. The questioning ceased and Edwards was taken to a jail cell. The following morning two detectives visited him, stating that they wanted to talk. They read Edwards his *Miranda* rights again. Edwards subsequently confessed. The Supreme Court reversed. Instead of applying the *Mosley* analysis, the Court adopted a different approach:

> "[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself *initiates* further communication, exchanges, or conversations with the police." *Id.* at 484-85 (emphasis added).

Several later cases clarified the *Edwards* rule. In Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam), the accused requested a polygraph test after receiving *Miranda* warnings. According to the Court this request satisfied the *Edwards* initiation requirement and his waiver encompassed post-test questioning as well as the questions asked while attached to the polygraph.

Despite *Edwards* and *Wyrick,* the lower courts remained divided over the relationship between the initiation requirement and the waiver requirement. Some courts treated them as distinct requirements, while other courts viewed "initiation" as only one factor in determining waiver. The Supreme Court resolved this conflict in Oregon v. Bradshaw, 462 U.S. 1039 (1983). Soon after asserting his right to counsel, Bradshaw asked, "Well, what is going to happen to me now?" A conversation followed in which Bradshaw agreed to take a polygraph test. At the conclusion of the test, he made an incriminatory statement. The plurality opinion took the position that *Edwards* requires a two-step analysis: (1) did the defendant initiate the communication, and (2) did he waive his *Miranda* rights. These inquiries are distinct and both "initiation" and waiver are required as a prerequisite to the admission of the statement. On this issue, the dissenting Justices concurred and thus a majority of the Court agreed on this two-step approach.

Nevertheless, Bradshaw lost his appeal because the plurality believed that his statement ("Well, what is going to happen to me now?") satisfied the initiation prong. Although the plurality acknowledged that some statements such as those requesting a drink of water or the use of a telephone would not constitute "initiation," Bradshaw's question, though ambiguous, "evinced a willingness and a desire for a generalized discussion about the investigation." *Id.* at 1045-46. This view of facts by the four-Justice plurality coupled with Justice Powell's concurrence was enough to doom Bradshaw's appeal.

Last term, the Court decided a somewhat different issue concerning the applicability of *Edwards.* In Smith v. Illinois, 105 S. Ct. 490 (1984), after being informed of his right to counsel, the defendant replied, "Uh, yeah. I'd like to do that." When asked whether he would be willing to talk without counsel, he said, "Yeah and no, uh, I don't know what's what, really." Nevertheless, he went on to make incriminating statements. On review, the Court held the statements inadmissible. *Smith* dealt with the threshold question under *Edwards* — whether the right to counsel had been asserted. The Court found that the initial assertion of the right to counsel was unambiguous and the defendant's subsequent conduct could not be used to make the assertion ambiguous. "[A]n accused's post-request responses to further interrogation may not be used to cast doubt on the clarity of this initial request for counsel." *Id.* at 491.

A related issue concerning the assertion of the right to counsel was raised in United States v. Porter, 764 F.2d 1 (1st Cir. 1985). In that case the court held that an unsuccessful telephone call to an attorney invoked the right to counsel. According to the court, a DEA agent who was present at the time the call was made should have informed the interrogating officer of the call. *Id.* at 6-7.

Misdemeanor Exception

On several occasions the Court has been asked to recognize exceptions to *Miranda.* For example, a number of lower courts had held that *Miranda* warnings were not required for misdemeanor offenses. *See* State v. Pyle, 19 Ohio St.2d 64, 68, 249 N.E.2d 826, 828 (1969) ("We hold that the ruling in Miranda . . . is not applicable to misdemeanors . . . ."), *cert. denied,* 396 U.S. 1007 (1970). In Berkemer v. McCarty, 104 S.Ct. 3138 (1984), the Court refused to accept such an exception: *Miranda* does not depend on "the nature or severity of the offense of which he is suspected or for which he was arrested." *Id.* at 3148. According to the Court, such an exception would create numerous difficulties for the police. The police often are unaware when they arrest a person whether he may have committed a misdemeanor or felony. Moreover, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters. *See also* State v. Buchholz, 11 Ohio St.3d 24, 462 N.E.2d 1222 (1984) (overruling *Pyle);* 14 Cap. U. L. Rev. 127 (1985). However, as *McCarty* makes clear, there is often no custody in this context and for that reason, *Miranda* is inapplicable.

Public Safety Exception

In New York v. Quarles, 104 S.Ct. 2626 (1984), the Supreme Court considered a public safety exception to *Miranda.* The defendant in *Quarles* was arrested soon after the police were informed by a rape victim that a man fitting his description had attacked her. The complaint included the fact that the rapist had a gun. At the time of his arrest, the defendant was wearing an empty shoulder holster. After handcuffing the defendant, the arresting officer asked where the gun was and the defendant responded, "The gun is over there."

On review, the Supreme Court recognized for the first time a public safety exception to *Miranda:* "We hold that

on these facts there is a 'public safety' exception to *[Miranda],* and that the availability of that exception does not depend upon the motivation of the individual officers involved." *Id.* at 2632. According to the Court, "So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it." *Id.* at 2632. The Court went on to hold that in such a situation the threat to the public safety outweighed the need for *Miranda's* prophylactic rule protecting the Fifth Amendment.

Although the Court labeled the public safety exception a "narrow exception," it failed to provide much guidance on its applicability. Despite the Court's assertions, there was no evidence of an accomplice, nor was there any evidence that the police could not have "sealed off" the area and searched for the weapon. The need for the exception, at least under the facts of the case, does not seem compelling. A far more persuasive argument for an exception is present in what has come to be known as the "rescue doctrine" cases, in which some courts had recognized an exception to *Miranda* where a defendant is questioned about the whereabouts of a kidnapping victim. *See* 1 W. LaFave & J. Israel, Criminal Procedure 508-09 (1984).

Few cases have applied this new exception. People v. Cole, 165 Cal. App.3d 41, 211 Cal. Rptr. 242 (1985), was one of the first cases. The court, applying *Quarles,* held that an inquiry about a stolen kitchen knife comes within the public safety exception. In contrast, the court in People v. Roundtree, 125 Ill. App.3d 1075, 482 N.E.2d 693 (1985), found the exception inapplicable where the defendants were all handcuffed and the scene was secured by the police. *See also* Comment, *New York v. Quarles: The Public Safety Exception to Miranda,* 70 Iowa L. Rev. 1075 (1985); 26 Ariz. L.J. 967 (1984); 23 Duq. L. Rev. 805 (1985); 36 Mercer L. Rev. 1059 (1985); 19 U. Rich. L. Rev. 193 (1984); 87 W. Va. L. Rev. 381 (1985).

Impeachment Exception

In Harris v. New York, 401 U.S. 222 (1971), the defendant denied on direct examination that he knew the nature of the substance that he had sold to an undercover officer. According to his testimony, he was attempting to defraud the officer by selling him baking powder. On cross-examination, the prosecutor questioned him about incriminating statements he had made at the time of arrest. The prosecution conceded that the statements had been obtained in violation of *Miranda* because the defendant had not been warned of his right to appointed counsel.

On review, the Supreme Court upheld the impeachment use of the statements:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. . . .
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. *Id.* at 225-26.

The Court also considered the impeachment issue in Oregon v. Hass, 420 U.S. 714 (1975), and reached the same conclusion.

Several courts have considered whether the impeachment exception recognized by *Harris* applies to witnesses *other than the defendant.* These attempts to extend *Harris* have failed. In United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982), the prosecution wanted to impeach defense psychiatrists with the defendant's illegally obtained statements in order to rebut an insanity defense. The court rejected such use:

> Were we to curtail the exclusionary rule in the drastic manner the government urges, we would provide little or no deterrence of constitutional violations against defendants whose sanity is the principal issue in the case. The government would be able, under the guise of rebuttal, to use any illegally obtained evidence relevant to the principal issue in the case — insanity. *Id.* at 134.

See also State v. Burnett, 637 S.W.2d 680, 689-90 (Mo. 1982) (illegally seized evidence cannot be used to impeach defense witnesses); State v. Hubbard, 103 Wash.2d 570, 693 P.2d 718, 722 (1985).

The impeachment exception applies only to statements obtained in violation of *Miranda.* As noted earlier, it does not apply to statements obtained in violation of the due process voluntariness test. Mincey v. Arizona, 437 U.S. 385 (1978). Nor does it apply to statements obtained in violation of the right to counsel. *See infra.*

Silence

The Court has refused to extend the impeachment exception to situations in which a suspect remains silent after receiving *Miranda* warnings. In Doyle v. Ohio, 426 U.S. 610 (1976), the Court wrote:

> Silence in the wake of *[Miranda]* warnings may be nothing more than the arrestee's exercise of [his] *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. . . . Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. *Id.* at 617-18.

The Court's reasoning is critical. Although the circumstances implicate *Miranda,* the Court did not rely on the Fifth Amendment. *Doyle* is a due process case. The centerpiece of the Court's analysis is an estoppel theory; the prosecution should be estopped from using a defendant's silence as evidence of guilt when the police induced that silence by giving the *Miranda* warnings. It is this aspect of *Doyle* that explains the Court's later cases.

In Anderson v. Charles, 447 U.S. 404 (1980) (per curiam), the defendant did not remain silent after receiving *Miranda* warnings. Consequently, there was no governmental inducement to remain silent: "But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." *Id.* at 408.

Jenkins v. Anderson, 447 U.S. 231 (1980), involved a case of *pre-arrest* silence. The defendant surrendered two weeks after he killed someone. When he testified that he had killed in self-defense, the prosecution questioned him about his delay in surrendering and commented in closing argument that the defendant "waited two weeks, according to the testimony — at least two weeks before he did anything about surrendering himself or reporting [the stabbing] to anybody." *Id.* at 234. Again, the Court relied on *Doyle's* inducement theory in holding that evidence of silence was admissible: "[N]o governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case." *Id.* at 240.

Fletcher v. Weir, 455 U.S. 603 (1982), involved post-arrest silence. However, no warnings were given. Here, too, the inducement theory proved critical: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* at 607.

Recently, the Court considered another *Doyle* issue. In Wainwright v. Greenfield, 106 S.Ct. 634 (1986), the prosecutor used the defendant's post-*Miranda* warnings silence as substantive evidence of the defendant's sanity. The Court found that *Doyle* controlled and reversed. The Court commented:

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. *Id.* at 639.

Other Proceedings

In several cases the Court has considered the applicability of *Miranda* to proceedings other than trial.

Prison Disciplinary Hearings

In Baxter v. Palmigiano, 425 U.S. 308 (1976), the Court refused to apply *Miranda* to prison disciplinary proceedings in which the charged conduct also constituted a crime under state law: "The Court has never held, and we decline to do so now, that the requirements of *[Miranda]* must be met to render pretrial statements admissible in other than criminal cases." *Id.* at 315.

Grand Jury Proceedings

In United States v. Mandujano, 425 U.S. 564 (1976), a plurality of the Court stated that *Miranda* warnings were not required when a grand jury witness is questioned about criminal conduct in which the witness may have been involved. The plurality viewed the grand jury process as fundamentally different from the police interrogation process:

> [The *Miranda]* warnings were aimed at the evils seen by the Court as endemic to police interrogation of a person in custody. *Miranda* addressed extrajudicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards. . . . But the *Miranda* Court simply did not perceive judicial inquiries and custodial interrogation as equivalents: "[T]he compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery." *Id.* at 576.

Juvenile Cases

Fare v. Michael C., 442 U.S. 707 (1979), involved the applicability of *Miranda* in juvenile court proceedings. The Court's holding in the case was narrow. The Court held only that a juvenile's request to speak with his probation officer, after receiving *Miranda* warnings, was not a per se invocation of the right to remain silent. In a footnote , however, the Court raised a question about the application of *Miranda* in this context:

> [T]his Court has not yet held that *Miranda* applies with full force to exclude evidence obtained in violation of its proscriptions from consideration in juvenile proceedings, which for certain purposes have been distinguished from formal criminal prosecutions. . . . We do not decide that issue today. In view of our disposition of this case, we assume without deciding that the *Miranda* principles were fully applicable to the present proceedings. *Id.* at 717 n.4.

Most lower courts, however, have applied *Miranda* to juvenile cases. *See* In re Dennis M., 70 Cal.2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969); In re R.A.H., 314 A.2d 133 (D.C. 1974); State v. Whatley, 320 So.2d 123 (La. 1975); State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973); In re Robert O., 109 N.Y. Misc.2d 238, 439 N.Y.S.2d 994 (Fam. Ct. 1981). *See also* W. Kurtz & P. Giannelli, Ohio Juvenile Law ch. 5 (1985).

Death Penalty Hearings

In one situation, the Court did extend *Miranda.* In Estelle v. Smith, 451 U.S. 454 (1981), the prosecution introduced expert psychiatric testimony on the issue of the defendant's future dangerousness during a death penalty hearing. The testimony was based on an interview with the defendant, which had been conducted by the state's expert. The Court ruled that *Miranda* warnings were required under these facts:

> The consideration [articulated in *Miranda*] calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was [in jail] when the examination was ordered and when it was conducted . . . . When Dr. Grigson went beyond simply reporting to the Court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting. *Id.* at 467.

State Constitutional Law

Even though the U.S. Supreme Court may limit the reach of *Miranda* under the federal Constitution, a state may provide greater protection to a defendant under the self-incrimination clause of a state constitution. The Supreme Court has recognized this principle in a number of its confession cases. For example, in Oregon v. Hass, 420 U.S. 714 (1975), the Court wrote: "[A] state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." *Id* at 719. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 95 Harv. L. Rev. 1324 (1982); Sedler, The State Constitutional Law in Ohio and the Nation, 16 U. Tol. L. Rev. 391 (1985).

A number of state supreme courts have accepted this invitation and imposed restrictions on police interrogation procedures. For example, several courts have rejected the impeachment exception to *Miranda* on state law grounds. *See* People v. Disbrow, 16 Cal.3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976); State v. Santiago, 53 Hawaii 254, 265-67, 492 P.2d 657, 664-65 (1971); Commonwealth v. Triplett, 462 Pa. 244, 249, 341 A.2d 62, 64 (1975). Similarly, the California Supreme Court has rejected Michigan v. Mosley, 423 U.S. 96 (1975), and held that an accused's invocation of the right to silence bars police from subjecting him again to custodial interrogation, even for another crime. People v. Pettingill, 21 Cal.3d 231, 248-49, 578 P.2d 108, 118-19, 145 Cal. Rptr. 861, 871-72 (1978). In Commonwealth v. Bussey, 486 Pa. 221, 230, 404 A.2d 1309, 1314 (1979), the Pennsylvania Supreme Court rejected *North Carolina v. Butler* on state constitutional grounds.

In at least one case, the Ohio Supreme Court relied on state grounds in resolving a confession issue. Ohio v. Gallagher, 425 U.S. 257 (1976), involved an in-custody parolee who was questioned by his parole officer without being informed of his *Miranda* rights. The U.S. Supreme Court, however, did not resolve the issue. Instead, the case was remanded "to determine whether the Ohio Supreme Court rested its decision upon the Fifth and Fourteenth Amendments to the Constitution of the United States, or Art. 1, § 10, of the Ohio Constitution, or both." *Id.* at 259. On remand, the Ohio Supreme Court reaffirmed its prior decisions, which required warnings, on state constitutional grounds. State v. Gallagher, 46 Ohio St. 2d 225, 348 N.E. 2d 336 (1976).

RIGHT TO COUNSEL

In 1964 the Supreme Court explicitly relied, for the first time, on the Sixth Amendment right to counsel to exclude a confession. In Massiah v. United States, 377 U.S. 201 (1964), the defendant made a statement to an accomplice after he had been indicted, retained counsel, and released on bail. Unknown to Massiah, his accomplice had agreed to cooperate with the police. The Court held that Massiah's Sixth Amendment rights had been violated because the police had "deliberately elicited" incriminatory statements after the right to counsel had attached. *Id.* at 206. Shortly after this decision, the Court decided Escobedo v. Illinois, 378 U.S. 478 (1964). Again, the Court relied on the right to counsel to suppress a confession.

Miranda was decided in 1966 and changed the focus of analysis to the Fifth Amendment. For the next decade, Sixth Amendment issues remained dormant. In later decisions, the Court emphasized that *Escobedo* had been displaced by *Miranda. See* Kirby v. Illinois, 406 U.S. 682, 687 (1972) ("prime purpose of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda,* to guarantee full effectuation of the privilege against self-incrimination."); United States v. Gouveia, 104 S.Ct. 2292, 2298 n. 5 (1984) ("we have made clear that we required counsel in *Miranda* and *Escobedo* in order to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel.").

The *Massiah* decision, however, was mostly forgotten after *Miranda.* One commentator has written that *Massiah* "was apparently lost in the shuffle of fast-moving events that reshaped constitutional-criminal procedure in the 1960s." Y. Kamisar, Police Interrogation and Confession 160 (1980). In 1977, however, the Court revived *Massiah* and again applied the right to counsel to exclude a confession.

In Brewer v. Williams, 430 U.S. 387 (1977), a murder defendant surrendered and was being returned to Des Moines, Iowa, when he made incriminatory statements. During this trip a detective gave what has become known as the "Christian Burial" speech, in which he pointed out that weather conditions might make discovery of the victim's body impossible and that the "parents of this little girl should be entitled to a Christian burial of the little girl. . . ." *Id.* at 393. The Court held that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." *Id.* at 401.

In 1980 the Court again relied on the right to counsel in United States v. Henry, 447 U.S. 264 (1980), and ruled statements obtained in a "jail plant" case inadmissible on Sixth Amendment grounds. In *Henry* the defendant was held pending trial after being indicted for bank robbery. The police contacted an inmate who had been a government informant and instructed him to be alert to any statements made by several federal prisoners but not to initiate any conversation with or question Henry regarding the bank robbery. The Court held that statements made by Henry to the informant violated the right to counsel.

The Sixth Amendment line of cases differs from *Miranda* in a number of respects and offers an independent vehicle to suppress confessions. As one court has noted: "The Sixth Amendment right to counsel is analytically distinct from the Fifth Amendment right created by *Miranda.*" United States v. Karr, 742 F.2d 493, 495 (9th Cir. 1984). The right to counsel analysis raises two issues: first, when does the right attach, and second, when have the police "deliberately elicited" an incriminatory statement.

Attachment of Right to Counsel

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence." Accordingly, the threshold inquiry is when a "criminal prosecution" commences. In *Massiah,* the progenitor of this line of cases, the defendant had been indicted and thus the Court readily found that the right to counsel had already attached at the time the statement was made. In *Brewer v. Williams* the defendant had not yet been indicted and the Court nevertheless found that the right to counsel had attached. According to the Court:

> There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. *Id.* at 399.

In recognizing that the right to counsel attached sometime before indictment, *Williams* followed earlier cases involving the Sixth Amendment in lineup situations. *See*

Kirby v. Illinois, 406 U.S. 682, 689 (1972) (judicial proceedings commence with the "formal charge, preliminary hearing, indictment, information, or arraignment"); Moore v. Illinois, 434 U.S. 220, 228 (1977) (prosecution commenced when "the victim's complaint was filed in court.").

The precise point in a criminal case at which the Sixth Amendment is triggered, however, is unclear. The Court's later confession cases do not address this issue. In United States v. Gouveia, 104 S.Ct. 2292, 2297-300 (1984), the defendants argued that the right to counsel had attached to prisoners in administrative segregation. Since even the initial stages of a criminal prosecution had not yet commenced, the Court rejected this argument. In both United States v. Henry, 447 U.S. 264 (1980), and Estelle v. Smith, 451 U.S. 454, 469-70 (1981), the defendants had been indicted and the right to counsel clearly had attached.

Considered together, the Court's Sixth Amendment confession and lineup cases provide some guidance. Under *Kirby,* an arrest alone does not trigger the right to counsel. *See* United States v. Muzychka, 725 F.2d 1061, 1068 (3d Cir.), *cert. denied,* 104 S.Ct. 2390 (1984). On the other hand, it is clear that the right to counsel attaches by the time of a preliminary hearing. Moore v. Illinois, 434 U.S. 220, 228 (1977). Moreover, *Brewer v. Williams* establishes that the right to counsel attaches even earlier than the preliminary hearing, although it is not clear exactly when. The lower courts are divided on whether a complaint and/or arrest warrant triggers the right to counsel. The Supreme Court has declined to decide this issue. *See* Edwards v. Arizona, 451 U.S. 477, 480 n.7 (1981). Some courts have held that judicial proceedings commence with the filing of a complaint. *E.g.,* People v. Curtis, 132 Ill. App.3d 241, 476 N.E.2d 1162, 1168 (1985). Other courts have held that an unexecuted arrest warrant does not trigger judicial proceedings. United States v. Reynolds, 762 F.2d 489, 493 (6th Cir. 1985).

Similarly, courts are split over whether an initial appearance triggers the right to counsel. *Compare* Ross v. State, 254 Ga. 22, 326 S.E.2d 194, 200 (initial appearance does not trigger right to counsel), *cert. denied,* 105 S.Ct. 3490 (1985), *with* People v. Bladel, 421 Mich. 39, 365 N.W.2d 56, 62 (1984) (initial arraignment triggers right), *cert. granted sub nom.* Michigan v. Jackson, 105 S.Ct. 2654 (1985). *Brewer v. Williams* seems to indicate that the right to counsel has attached by this time, since one of the factors mentioned by the Court was the defendant's arraignment.

Although there is some uncertainty about the exact time at which the right to counsel attaches, it is clear that this inquiry is very different from the *Miranda* issue of "custodial interrogation." Sweat v. Arkansas, 105 S.Ct. 933 (1985) (Marshall, J., dissenting from denial of certiorari) (lower court found that right to counsel had not attached because the accused was not under arrest or deprived of his freedom). Custody under *Miranda* clearly occurs with an arrest but an arrest alone does not trigger the right to counsel. Moreover, once a defendant is indicted and released on bail, he is no longer in custody and yet the right to counsel has attached. This was the situation in *Massiah.* There are, of course, times when both *Miranda* and the right to counsel would apply. *Brewer v. Williams* is illustrative, although the Court decided only the Sixth Amendment issue in that case.

"Deliberately Elicit" Test

Once the right to counsel has attached, it still must be determined what type of police conduct violates the right. In *Massiah* the Court held that the Sixth Amendment prohibits law enforcement officers from "deliberately elicit[ing]" incriminating statements once the right attached.

One initial problem is determining whether "deliberate elicitation" under the Sixth Amendment is the same as "interrogation" under *Miranda.* Although the Court seemed to equate interrogation and deliberate elicitation in *Brewer,* later cases have distinguished the two terms. In Rhode Island v. Innis, 446 U.S. 291 (1980), the Court wrote in a footnote:

> There is language in the opinion of the Rhode Island Supreme Court in this case suggesting that the definition of "interrogation" under *Miranda* is informed by this Court's decision in *Brewer v. Williams*. . . . This suggestion is erroneous. . . . The definitions of "interrogation" under the Fifth and Sixth Amendments, if indeed the term "interrogation" is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct. *Id.* at 300 n.4.

In other words, interrogation would qualify as deliberate elicitation but so would other police conduct. This point is illustrated by United States v. Henry, 447 U.S. 264 (1980), in which the Court found a Sixth Amendment violation where the police requested a jail informant, pursuant to a contingent fee arrangement, to be alert to any statements made by the defendant. Even without interrogation, the right to counsel was violated: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Id.* at 274. *See also* McCubbin v. State, 675 P.2d 461 (Okla. Crim. App. 1984) (fact that the private detective who was planted in jail did not question accused is immaterial) (listing other cases).

Recent Cases

This term the Court has decided to review two cases that may provide a vehicle for clarifying some of these issues. The first case, Maine v. Moulton, 106 S.Ct. 477 (1984), was decided in December. In that case, Moulton and a codefendant were indicted for theft. Unknown to Moulton, his codefendant confessed to the police and agreed to be a prosecution witness. The police placed a body wire transmitter on the codefendant when he was scheduled to meet Moulton to discuss defense strategy for their coming trial. Part of their discussion concerned the elimination of witnesses, a subject which Moulton had raised earlier. Moulton's incriminating statements concerning the pending theft charges were admitted at his trial. The Court held that Moulton's right to counsel had been violated: "[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.* at 487. The fact that the police were investigating a different crime — the intimidation or elimination of witnesses — did not change the result. According to the Court, the police's obligation to investigate other crimes could not be used to violate the defen-

dant's right to counsel for *pending* charges.

In the second case, Henderson v. Wilson, 742 F.2d 741 (2d Cir. 1984), *cert. granted,* 105 S.Ct. 3499 (1985), an informant was placed in the defendant's cell and instructed to listen for helpful information. The cell overlooked the parking garage where the murder took place. The Second Circuit held that the police deliberately elicited incriminatory statements in violation of the right to counsel. *Id.* at 744-45.

Waiver

There is disagreement over whether the Sixth Amendment imposes a greater and different standard for waiver than that imposed by *Miranda.* Several authorities argue that it does. *See* Wyrick v. Fields, 459 U.S. 42, 53 (1982) (Marshall, J., dissenting) ("a suspect may waive his Fifth Amendment to remain silent without waiving his Sixth Amendment right to counsel."). *See also* People v. Bladel, 421 Mich. 39, 365 N.W.2d 56, 62-70 (1984), *cert. granted sub. nom.* Michigan v. Jackson, 105 S.Ct. 2654 (1985); Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel,* 82 Colum. L. Rev. 363 (1982).

Courts have adopted three distinct positions on the issue. First, some courts hold that the standard for waiving the right to counsel and *Miranda* are the same. *See* United States v. Woods, 613 F.2d 629, 634 (6th Cir.), *cert. denied,* 446 U.S. 920 (1980); Jordan v. Watkins, 681 F.2d 1067, 1075 (5th Cir. 1982). At the other extreme, the Second Circuit has held that not only is the *Miranda* waiver test insufficient for Sixth Amendment purposes but that the waiver must be obtained by a judicial officer. United States v. Mohabir, 624 F.2d 1140, 1152-53 (2d Cir. 1980) (under supervisory authority). Still other circuits have taken an intermediate position. *See* United States v. Karr, 742 F.2d 493, 496 (9th Cir. 1984) (informed of right to counsel and commencement of judicial proceedings).

Impeachment

Another area in which the Sixth Amendment and *Miranda* may differ concerns the impeachment exception. As noted earlier, an accused may be impeached with a statement obtained in violation of *Miranda.* Whether this impeachment exception applies in the right to counsel context is unclear. Several courts have refused to recognize such an exception. The defendant in United States v. Brown, 699 F.2d 585, 590 (2d Cir. 1983), was questioned by the police after he had been indicted and an hour before his arraignment, at which time counsel would have been appointed. The court found that this interrogation violated the Sixth Amendment since the indictment triggered his right to counsel. The prosecution, citing the impeachment exception to *Miranda,* argued that the statement was nevertheless admissible for impeachment. The court rejected the argument, distinguishing the right to counsel and *Miranda. See also* Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983).

Appointment of Counsel

The defendants in *Williams* and *Massiah* had retained counsel at the time they made incriminatory statements. Nevertheless, the right to counsel does not depend on whether counsel has been retained or appointed; the issue is whether the defendant was entitled to counsel. In *Williams* the Court commented: "[T]he right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." 430 U.S. at 398.

The Court's action in McLeod v. Ohio, 381 U.S. 356 (1965), also supports this view. In *McLeod* the police obtained a statement from an indicted defendant who was not represented by counsel. The Court vacated the judgment and remanded the case "to the Supreme Court of Ohio for consideration in light of *Massiah v. United States. . . .*" McLeod v. Ohio, 378 U.S. 582 (1964). On remand, the Ohio Supreme Court upheld the conviction by distinguishing *Massiah* on the grounds that McLeod "was not then represented by counsel and had not even requested counsel." State v. McLeod, 1 Ohio St.2d 60, 62, 203 N.E.2d 349, 351 (1964). The case went back to the U.S. Supreme Court, which, citing *Massiah,* reversed per curiam. The Court's later cases demonstrate that *McLeod* is still good law: "[I]n McLeod v. Ohio, . . . we summarily reversed a decision that the police could elicit information after indictment even though counsel had not yet been appointed." Edwards v. Arizona, 451 U.S. 477, 484 n.8 (1981). See also Sweat v. Arkansas, 105 S.Ct. 933, 937 (1985) (Marshall, J. dissenting from denial of certiorari).

DERIVATIVE EVIDENCE

The exclusionary rule applies not only to primary evidence obtained as a direct result of unconstitutional conduct but also to evidence later discovered and found to derive from that conduct. Secondary or derivative evidence is often referred to as "fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341 (1939). The genesis of this rule is Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), where the Court wrote: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392. Nevertheless, from the beginning the Court has recognized exceptions to the derivative evidence rule. Initially, the Court commented that evidence derived from an independent untainted source was admissible. Later, the Court recognized a second exception, known as the attenuation rule. Thus, even in the absence of an independent source, secondary evidence may be admissible if the "causal connection . . . may have become so attenuated as to dissipate the taint." Nardone v. United States, 308 U.S. 338, 341 (1939). Recently, the Court recognized a third exception — the inevitable discovery rule. Nix v. Williams, 104 S.Ct. 2501 (1984).

In confession cases, two distinct derivative evidence issues may arise: (1) where secondary evidence is derived from an illegally obtained confession, and (2) where the confession is the fruit of some other constitutional violation, such as an illegal search or seizure.

Confession as the Poisonous Tree

Inevitable Discovery

In Nix v. Williams, 104 S.Ct. 2501 (1984), the Court for the first time explicitly recognized the inevitable discovery exception. This case involved the retrial of *Brewer v. Williams,* in which Williams' statement given in response to the Christian Burial Speech had been suppressed on

right to counsel grounds. In a footnote, the Court raised the possibility that evidence concerning the victim's body might be admissible at a retrial, even though the body was found as a result of the confession:

> While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. 430 U.S. at 407 n.12.

Thus, it was not surprising that the prosecution attempted to introduce evidence of the condition of the body, articles and photographs of the victim's clothing, and medical and chemical tests on the body at the retrial. The prosecution's theory was that a search for the body, which had been terminated when it was learned that Williams had led the police to the body, would have found the body in any event. The 200-person search party stopped two and a half miles from the place where the body was located.

The Supreme Court endorsed this argument, finding that the deterrent effect of the exclusionary rule did not require suppression in this context: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means — here the volunteers' search — then the deterrence rationale has so little basis that the evidence should be received. 104 S.Ct. at 2509. Based on the record, the Court concluded that the prosecution had satisfied this burden and the evidence was therefore admissible.

Attenuation

The attenuation exception to the derivative evidence rule differs from the inevitable discovery rule. With this exception, the evidence is "tainted" but the causal connection, for some reason, has been dissipated or attenuated. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

The principal issue in this context is whether a second confession obtained after an initial tainted confession is admissible. In United States v. Bayer, 331 U.S. 532 (1947), the Court had written:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. *Id.* at 540.

Bayer, however, predated *Miranda* and the Court in Oregon v. Elstad, 105 S.Ct. 1285 (1985), found a distinction between coerced confessions and confessions obtained in violation of *Miranda.* This distinction, according to the Court, makes the subsequent reading of *Miranda* warnings sufficient attenuation in virtually all cases.

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement *ordinarily* should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights. *Id.* at 1296 (emphasis added).

Confession as Fruit of the Poisonous Tree

The derivative evidence doctrine also applies when a confession is the product of an illegal search or seizure. In this situation, the confession is the fruit of the poisonous tree. The Court has decided several cases involving this issue. Here, the issue is whether the connection between the Fourth Amendment violation and the confession had been dissipated or attenuated.

Arrested without probable cause, the defendant in Brown v. Illinois, 422 U.S. 590 (1975), was taken to the police station. After receiving *Miranda* warnings, he made two separate statements which implicated him in a murder. The state court held that the *Miranda* warnings automatically purged the confession of the taint of the illegal arrest. The Supreme Court rejected this argument:

> [T]he *Miranda* warnings, *alone* and *per se,* cannot always make the act [of confessing] sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited . . . . The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. . . The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factors to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. *Id.* at 603-04.

Applying these factors, the Court concluded that Brown's confession had not been purged of the taint of the illegal arrest because (1) the statement was obtained shortly after the arrest (within two hours), (2) no intervening events such as presentment to a magistrate, consultation with an attorney, or release from custody had occurred, and (3) the arrest had a "quality of purposefulness" — its "impropriety. . .was obvious." *Id.* at 605. Accordingly, the confession was inadmissible.

In subsequent cases, the Court has applied the *Brown* factors, although with varied results. *See* Dunaway v. New York, 442 U.S. 200 (1979) (*Miranda* warnings insufficient attenuation); Rawlings v. Kentucky, 448 U.S. 98 (1980) (attenuation found); Taylor v. Alabama, 457 U.S. 687 (1982) (no attenuation); Lanier v. South Carolina, 106 S.Ct. 297 (1985).

REFERENCES

C. McCormick, Evidence ch. 14 (3d ed. 1984)

1 W. LaFave & J. Israel, Criminal Procedure ch. 6 (1984)

Y. Kamisar, Police Interrogation and Confessions (1980)

L. Katz, Ohio Arrest Search and Seizure ch. 31 (1984)

3 J. Wigmore, Evidence ch. 30 (Chadbourn rev. 1970)

C. Whitebread, Constitutional Criminal Procedure ch. 12 (1978).